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No. 88-313

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HALLMARK CARDS, INCORPORATED and
HALLMARK MARKETING CORPORATION,

Petitioners,

—v.—

HARTFORD HOUSE, LTD. d/b/a BLUE MOUNTAIN ARTS,
SUSAN POLIS SCHUTZ, AND STEPHEN SCHUTZ,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Petitioners Hallmark Cards, Incorporated and Hallmark Marketing Corporation ("Hallmark") submit this reply brief in support of their Petition for a writ of certiorari to the United States Court Of Appeals For The Tenth Circuit, filed August 22, 1988.

ARGUMENT

1. Blue Mountain's principal response to Hallmark's petition is that the writ of certiorari is sought to review an affirmance of a preliminary injunction. That is certainly true. It is in the nature of Lanham Act cases—which typically involve disputes about products being sold in the marketplace—that they tend to be fought at the preliminary injunction or pre-trial motion stage. Sixty percent of the 89 Section 43(a) cases decided

by the courts of appeals since 1985 involved appeals from orders granting or denying preliminary injunctions or pre-trial orders.[1] If, as Blue Mountain urges, the Court were to reject all petitions to review decisions on preliminary injunctions, the Court would cut itself off from a large portion—and possibly the most urgent and important portion—of decisions in this developing area of commercial law. The Court has undisputed statutory authority to review an affirmance of a preliminary injunction, 28 U.S.C. § 1254(1), and has often done so. *E.g.*, *Citicorp Industrial Credit Inc. v. Brock*, 107 S.Ct. 2694, 2698 (1987); *Community Communications Co. v. Boulder*, 455 U.S. 40, 48 (1982). *See* 17 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4036 (1988). Where such review would not only resolve an important and controlling issue of law prior to a lengthy jury trial, but would also provide badly needed guidance to hundreds of manufacturers in a difficult and uncertain area of federal law, there is compelling reason for immediate review.

2. Blue Mountain tries to have the argument about what it seeks to protect both ways. In arguing that more than a style of art is at issue, it contends that its "look" is the " 'overall uniform appearance comprised of some or all of the features listed by the court' " of its cards. (Opposition at 20.) That list, of course, is a complete description of Blue Mountain's product. App. A at 4a; App. B at 21a-22a. But in arguing that its "look" is not *functional*, Blue Mountain asserts that "this case involves greeting card *decorations*." (Opposition at 22; emphasis added.) Either the "look" protected by the courts below amounts to the entire product, giving Blue Mountain an unconstitutional monopoly, or it amounts to a style of art, protection of which is forbidden by the Copyright Act. There is no need for the Court to review the facts found by the courts below to conclude that either result is improper.

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1 Fifty-three cases, as opposed to 36 appeals after trial. Source: Lexis search, September 1988.

3. Contrary to Blue Mountain's suggestion (Opposition at 17, 19), Hallmark has not urged that trademarks be abolished or that forty years of trade dress law be overturned.[2] Rather, Hallmark argues that the courts below have taken trade dress law to an extreme that brings it into conflict with the Copyright Act and with the Constitution itself, by conferring protection from competition, unlimited in time, not on the arbitrary features of packaging or decoration that constitute classic trade dress, but on the entire product. This extreme protection confers a monopoly foreign to the Constitution. The Court should grant a writ of certiorari, not to abolish trade dress law, but to return it to its proper function of protecting non-functional identifying features of packaging or marking.

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2 In fact, the watershed case for the expansion of the "trade dress" theory to protect product features under § 43(a) was decided only twelve years ago. *See Truck Equipment Service Co. v. Freuhauf Corp.*, 536 F.2d 1210 (8th Cir.), *cert denied*, 429 U.S. 861 (1976).

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Hallmark's Petition, a writ of certiorari should be granted.

September 1988

Respectfully submitted,

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